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DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

[Docket No. FR-5613-N-06-B]

Privacy Act of 1974; New System of Records, Office of General Counsel E-Discovery Management System: Republication of System Description and Solicitation of Comment

AGENCY: Office of the Chief Information Officer, HUD.

ACTION: Notice.

SUMMARY: This notice solicits additional comment on a new system of records for the Office of General Counsel (OGC) E-Discovery Management System (EDMS). EDMS was first announced and described in a July 17, 2012, Federal Register notice, in which HUD solicited comment. Based on comment received, this notice makes certain revisions to the description of EDMS in the July 17, 2012, notice and solicits additional comment. Additional clarification is provided regarding the system of records: Category of Individuals Covered by the System; the Purpose Category; Retention Use and Disposal of Records Category, and System Location Category.

DATES: Comments Due Date: **[Insert 30 days after publication of this notice in the Federal Register]**:

ADDRESSES: Interested persons are invited to submit comments regarding this notice to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-0500.

Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW, Room 10276, Washington, DC 20410-0500.

2. Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the <http://www.regulations.gov> Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that Web site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at (202)708-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number through TTY by calling the Federal Relay Service at (800) 877- 8339. Copies of all comments submitted are available for inspection and downloading at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT: For inquiries pertaining to Privacy Act records, contact Donna Robinson-Staton, Chief Privacy Officer, Department of Housing and Urban Development, 451 7th Street SW, Washington, DC 20410 (Attention: Capitol View

Building, 4th Floor) telephone number (202) 402-8073 (this telephone number is not toll free).

A telecommunications device for hearing- and speech-impaired persons (TTY) is available by calling the Federal Relay Service's toll-free telephone number (800) 877-8339.

SUPPLEMENTARY INFORMATION:

Background

Pursuant to the Privacy Act of 1974 (5 U.S.C. 552a) (Privacy Act), HUD published in the Federal Register on July 17, 2012, at 77 FR 41997, a notice that announced a new system of records for OGC's E-Discovery Management System (OGC-EDMS), a system expected to significantly improve the efficiency of OGC's processing of records during the preservation, discovery, and processing of litigation requests when litigation is "reasonably anticipated"¹ and reduce the time HUD staff spend on the document review and production process. OGC-EDMS is in response to and consistent with e-discovery preservation and production requirements in the Federal Rules of Civil Procedure.

The July 17, 2012, notice solicited public comment on OGC-EDMS for a period of 30 days. The notice advised that EDMS would carry a final effective date of August 16, 2012, unless HUD received comments which would result in a contrary determination. HUD received public comment in response to the July 17, 2012, notice. On August 15, 2012, at 77 FR 49011, HUD published a notice advising of a change the final effective date of OGC-EDMS, the commitment to re-publish the description of OGC-EDMS with certain clarifications, respond to

¹ "Reasonably anticipated" is the legal test articulating the standard for when the duty to preserve electronically stored information begins. A key case is Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Secs., LLC, 05 Civ. 9016 (SAS), 2010 U.S. Dist. LEXIS 4546, at *14-15 (S.D.N.Y. Jan. 15, 2010).

public comments received in response to the July 17, 2012, notice, and seek additional public comment.

The system report was submitted to the Office of Management and Budget (OMB), the Senate Committee on Homeland Security and Governmental Affairs, and the House Committee on Government Reform pursuant to Paragraph 4c of Appendix I to OMB Circular No. A-130, "Federal Agencies Responsibilities for Maintaining Records About Individuals," July 25, 1994 (59 FR 37914).

Discussion of Public Comments

In response to the July 17, 2012, notice, HUD received comments from a national professional association representing trial lawyers, and a coalition consisting of advocacy groups representing consumers, as well as advocacy groups fighting racial injustice and housing discrimination.

Comment: HUD should comply with the Federal Rules of Civil Procedure and should not destroy original documents. The commenters stated that OGC-EDMS should be regulated by the Federal Rules of Civil Procedure. The commenters further stated that they had significant concerns about the proposed retention and disposal policy which allowed HUD's OGC to destroy litigation data when closing a case. The commenters requested that original documents not be destroyed as part of an electronic data purge, and that copies of the case data be made available in the event of a Freedom of Information Act (FOIA) request or the need to revisit a particular case or series of cases.

HUD Response: In response to the commenters' concerns about the consistency of HUD's policies with the Federal Rules of Civil Procedure, HUD is providing additional operational information about EDMS and the other HUD electronic information systems. HUD

is also clarifying that when litigation is “reasonably anticipated,” related electronic data is forensically copied and maintained in a secure server environment separate from HUD’s network servers as part of the OGC-EDMS. In this secure server environment, electronic data is preserved in a way that prevents metadata spoliation by the system or the owner of the data. As part of the Electronic Discovery Reference Model, HUD users are able to review and analyze the relevant electronic data that has been forensically copied and maintained as part of the EDMS. Reviewing the forensically copied electronic data within the EDMS prevents users from altering or improperly handling original documents, which is in all parties’ interests.

After authorization from an OGC manager, such as an Associate General Counsel or Regional Counsel, is received, OGC requests a case to be closed within the EDMS. The case and related electronic litigation data that has been copied and secured in a production environment for the purposes of litigation, is purged electronically from the EDMS. This purging does not include purging of electronic data from its original source such as network servers. Electronic data is properly retained on network servers and other sources as mandated by the HUD’s Office of General Counsel Records Disposition Schedule 2 – Legal Records, 2225.6 REV-1, CHG-APPENDIX 2² and HUD’s Office of the Chief Information Officer Electronic Mail Policy, 2400.1 REV01, CHG³. These handbooks are available on HUD’s web pages through hudclips.

In response to commenters’ concerns, HUD is revising its System of Records notice for the EDMS to clarify that original documents are not destroyed as part of HUD’s E-Discovery efforts. Revisions to the text of the Retention and Disposal Section that follows should clarify

² http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/handbooks/admh/2225.6

³ <http://www.hud.gov/offices/adm/hudclips/handbooks/cioh/>

the process. For the convenience of the public, HUD is providing a complete summary within this notice of the location, purposes, and operational description of EDMS to facilitate comment.

AUTHORITY: 5 U.S.C. 552a; 88 Stat. 1896; 42 U.S.C. 3535(d).

Date: November 7, 2012

Jerry E. Williams
Chief Information Officer

[FR-5613-N-06-B]

Summary Description of EDMS

OGC.CAGC.01

SYSTEM NAME: Office General Counsel Electronic Discovery Management System.
(OGC-EDMS)

SYSTEM LOCATIONS: The EDMS application will be stored on servers located at 4701 Forbes Boulevard, Lanham, MD 20706. Custodian data to be retrieved is stored on servers and HUD workstations located throughout the country.⁴

PURPOSES: OGC-EDMS provides OGC with a method to initiate, track, and manage the collection, organization, and production of paper and electronic documents for discovery requests, such as litigation hold memoranda, E-Discovery certifications, electronically stored information (ESI) search requests, closure letters, and any other documents and data relevant to the discovery process requiring analysis, review, redaction, and production to respond to litigation discovery requirements. The purpose of this system is to assist HUD to collect electronically stored information and data of any individual who is, or will be, in litigation with HUD, as well as the attorneys representing the plaintiff(s) and defendant(s) in response to claims by employees, former employees, and other individuals; to assist in the settlement of claims against the government; to represent HUD during litigation, and to maintain internal statistics. A new software component is being added to HUD's EDMS process that will streamline the collection, storage, and analysis of case data to be responsive to requests to HUD.

On December 1, 2006, the Federal Rules of Civil Procedure were amended to create and clarify responsibility for preserving and accessing ESI. The obligation to preserve ESI, as well as paper records, begins when an individual "reasonably anticipates" litigation and concludes that the evidence may be relevant to such future litigation. Once an individual "reasonably

⁴ <http://portal.hud.gov/hudportal/documents/huddoc?id=append2.pdf>

anticipates” litigation, he/she must suspend any document alteration or destruction to ensure the preservation of relevant documents and electronically stored information, including emails.

EDMS and its various capabilities will allow OGC to streamline and automate the document and data reviews it conducts, allow the attorneys to analyze the information in different formats, conduct the analysis in bulk more efficiently, and protect unwarranted disclosure of information by flagging files that contain information therein that is protected from disclosure.

AUTHORITY FOR MAINTENANCE OF THE SYSTEM: The federal regulation(s)/statute(s) that gives OGC the authority to collect and store this information is Federal Rules of Civil Procedure (FRCP) 16(b) which allows the court to establish rules around disclosure, privilege, methods and work product prior to electronic discovery commencing. In this context, disclosure is the collection of data. Other relevant regulations surrounding the collection and management of electronic discovery are FRCP 26(b)(2), 26(b)(5)(B), 26(f), 33(d), 34(a), 34(b), 37(f), and 45.

CATEGORIES OF INDIVIDUALS COVERED BY THE SYSTEM: Categories of individuals covered by this system include: (1) all persons subject to a litigation hold due to a “reasonable anticipation of litigation” as determined by HUD’s OGC; (2) all persons deemed a participant of past or present litigation, investigations, or arbitration where HUD is involved; and (3) specified individuals impacted by FOIA requests, litigation, and other cases in HUD.

A wide variety of individuals are covered by the system including: individuals who either file administrative complaints with HUD or are the subject of administrative complaints initiated by HUD; individuals who are named parties in cases in which HUD believes it will or may become involved; individuals involved in matters within the jurisdiction of HUD either as plaintiffs or as defendants in both civil and criminal matters; witnesses, and to the extent not covered by any other system, tort and property claimants who have filed claims against the

Government; individuals who are the subject of an action requiring approval or action by a HUD official, such as appeals, actions, training, awards, promotions, selections, grievances and delegations, including the OGC attorneys to whom cases are assigned, and attorneys and authorized representatives for whom HUD has received complaints regarding their practices before HUD.

CATEGORIES OF RECORDS IN THE SYSTEM: Categories of records in this system include: (1) Custodian name; (2) Custodian work address; (3) Custodian e-mail address; (4) Case Name; (5) Case number; (6) Custodian e-mail data, including messages among other HUD employees and/or personnel of other federal agencies or outside entities, and attachments; (7) Custodian local/shared drive data of information collected or compiled from law enforcement or other agency databases; (8) Spreadsheets including data collections, often including personally identifiable information and sensitive law enforcement data used to track the process or investigations or focus investigative priorities; records relating to litigation by or against the U.S. Government (or litigation in which the U.S. Government is not a party, but has an interest) resulting from questions concerning HUD cases and legal actions that HUD either is involved in or in which it believes it will or may become involved; claims by or against the U.S. Government, other than litigation cases, arising from a transaction with HUD, and documents related thereto, including demographic information, vouchers, witness statements, legal decisions, and related material pertaining to such claims; investigation reports; legal authority; legal opinions and memoranda; criminal actions; criminal conviction records; claims and records regarding discrimination, including employment and sex discrimination; claims and records regarding the Rehabilitation Act of 1973 (26 U.S.C. 701); personnel matters; contracts; foreclosures; actions against HUD officials; records relating to requests for HUD records other than requests under the Freedom of Information Act and the Privacy Act of 1974; testimonies of HUD employees in federal, state, local, or administrative criminal or civil litigation;

documentary evidence; supporting documents including the legal and programmatic issues of the case, correspondence, legal opinions and memoranda and related records; security clearance information; any type of legal document, including but not limited to complaints, summaries, affidavits, litigation reports, motions, subpoenas, and any other court filing or administrative filing or evidence; employee and former employee ethics question forms and responses; and court transcripts.

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND PURPOSES OF SUCH USES:

1. To a Congressional office from the record of an individual in response to an inquiry from that Congressional office made at the request of the individual to whom the records pertain;
2. To the National Archives and Records Administration for use in its records management inspections and its role as an Archivist;
3. To the Department of Justice (DOJ) when seeking legal advice for a HUD initiative or in response to DOJ's request for the information, after either HUD or DOJ determine that such information is relevant to DOJ's representatives of the United States or any other component in legal proceedings before a court or adjudicative body, provided that, in each case, the agency also determines prior to disclosure that disclosure of the records to the DOJ is a use of the information contained in the records that is compatible with the purpose for which HUD collected the records. HUD on its own may disclose records in this system of records in legal proceedings before a court or administrative body after determining that the disclosure of the records to the court or administrative body is a use of the information contained in the records that is compatible with the purpose for which HUD collected the records; or to another agency or to an instrumentality of any governmental jurisdiction within or under the control of the United States for a civil or

criminal law enforcement activity if the activity is authorized by law, and if the head of the agency or instrumentality has made a written request to the agency which maintains the record specifying the particular portion desired and the law enforcement activity for which the record is sought;

4. To third parties during the course of a law enforcement investigation to the extent necessary to obtain information pertinent to the investigation;
5. To contractors, grantees, experts, consultants, and the agents thereof, and others performing or working on a contract, service, grant, cooperative agreement, or other assignment for HUD, when necessary to accomplish an agency function related to its system of records. Individuals provided information under this routine use are subject to the same Privacy Act requirements and limitations on disclosure as are applicable to HUD officers and employees;
6. To third parties during the course of a law enforcement investigation to the extent necessary to obtain information pertinent to the investigation, provided disclosure is appropriate to the proper performance of the official duties of the officer making the disclosure;
7. To a court, magistrate, or administrative tribunal in the course of presenting evidence, including disclosures to opposing counsel or witnesses in the course of civil discovery, litigation, or settlement negotiations or in connection with criminal law proceedings or in response to a subpoena;
8. To a grand jury agent pursuant either to a federal or state grand jury subpoena, or to a prosecution request that such record be released for the purpose of its introduction to a grand jury, where the subpoena or request has been specifically approved by a court; and
9. To appropriate agencies, entities, and persons when: a) HUD suspects or has confirmed that the security or confidentiality of information in a system of records has been

compromised; b) HUD has determined that as a result of the suspected or confirmed compromise there is a risk of harm to economic or property interests, identity theft or fraud, or harm to the security or integrity of systems or programs (whether maintained by HUD or another agency or entity) that rely upon the compromised information; and c) the disclosure made to such agencies, entities, and persons is reasonably necessary to assist in connection with HUD's efforts to respond to the suspected or confirmed compromise and prevent, minimize, or remedy such harm for purposes of facilitating responses and remediation efforts in the event of a data breach.

POLICIES FOR STORING, RETRIEVING, AND DISPOSING OF SYSTEM RECORDS:

STORAGE: Data collected by OGC-EDMS is stored electronically in a Storage Area Network/Network Attached. There are no manual records stored or maintained outside the system. Storage is at a secure Lockheed Martin facility, and backed up via an Avamar Backup Storage system.

RETRIEVABILITY: Records will be retrieved by the (1) Custodian name; (2) Work address; (3) Custodian e-mail address; (4) Case name; (5) Case number; (6) Custodian e-mail data; (7) Custodian local drive data; (8) Custodian home/shared drive data; (9) Litigation hold closures; (10) Litigation hold memoranda; (11) Litigation preservation notices; (12) Litigation hold reminder notices; and (13) ESI identification e-mail notifications. E-Discovery notifications data is only accessed by individually assigned legal counsel on a case by case basis.

SAFEGUARDS: Strict controls have been imposed to minimize the risk of compromising the information that is being stored. Access to the computer system containing the records in this system is limited to those individuals who are authorized to access by appropriate security clearances and user ID/password permissions. Only assigned users with a

need-to-know are allowed access, on a case-by-case basis after going through HUD's background investigation process.

RETENTION AND DISPOSAL: In response to the FRCP 16(b), when litigation is "reasonably anticipated," related electronic data is copied and maintained in a secure server environment separate from HUD's network servers as part of the EDMS.⁵ Upon authorization from a HUD Associate General Counsel, Regional Counsel, or other designated official, OGC closes a case. The closed case and related electronic litigation data that has been copied and secured in a production environment for the purposes of litigation is purged electronically from the EDMS. The purging process does not extend to purging electronic data from its original source, such as network servers. Electronic data is properly retained on network servers and other sources as required by HUD's Office of General Counsel Records Disposition Schedule 2 – Legal Records, 2225.6 REV-1, CHG-APPENDIX 2⁶ and the Electronic Mail Policy, 2400.1 REV01, CHG⁷.

SYSTEM MANAGERS AND ADDRESSES: Office of General Counsel (OGC) Tenille Washburn, Assistant General Counsel, Field Management and IT Division, Department of Housing and Urban Development, 1250 Maryland Avenue, SW Suite 200, Washington, DC 20024. The phone contact information is (202) 402-6536. This is not a toll free number.

NOTIFICATION AND RECORD ACCESS PROCEDURES: Individuals seeking to determine whether this system of records contains information about them, or those seeking access to such records, should address inquiries to Donna Staton-Robinson, Chief Privacy Officer, Department of Housing and Urban Development, 451 7th Street SW, Room 4156, Washington, DC 20410. (Attention: Capitol View Building, 4th Floor.) The phone contact

⁵ Other relevant regulations surrounding the collection and management of electronic discovery are FRCP 26(b)(2), 26(b)(5)(B), 26(f), 33(d), 34(a), 34(b), 37(f), and 45.

⁶ http://portal.hud.gov/hudportal/HUD?src=/program_offices/administration/hudclips/handbooks/admh/2225.6.

⁷ <http://www.hud.gov/offices/adm/hudclips/handbooks/cioh/>

information is (202) 708-5495. This is not a toll free number. Provide verification of your identity by providing two proofs of official identification. Your verification of identity must include your original signature and must be notarized.

CONTESTING RECORD PROCEDURES: HUD's rules for contesting the contents of records and appealing initial denials by the individual concerned appear in 24 CFR part 16. If additional information or assistance is needed, it may be obtained by contacting HUD officials as follows:

- (i) Contesting contents of records: The Department of Housing and Urban Development, Chief Privacy Officer, 451 Seventh Street, SW, Washington, DC 20410;
- (ii) Appeals of initial HUD determinations: In relation to contesting contents of records, the HUD Departmental Privacy Appeals Officers, Office of General Counsel, Department of Housing and Urban Development, 451 Seventh Street SW, Washington, DC 20410.

RECORD SOURCE CATEGORIES: Documents and records in this system originate from HUD and its components, courts, subpoenas, law enforcement agencies, other federal, state, and local agencies, inquiries and/or complaints from witnesses or members of the general public.

EXEMPTIONS: The records in EDMS are maintained for use in civil rather than criminal actions. For that reason, the relevant provision of the Privacy Act is 5 U.S.C. 552a(d)(5) which states "nothing in this [Act] shall allow an individual access to any information compiled in reasonable anticipation of a civil action or proceeding." (See U.S. Department of Justice, Office of Privacy and Civil Liberties, Overview of the Privacy Act of 1974 (2010) 212.⁸)

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⁸ <http://www.justice.gov/opcl/1974tenexemp.htm#one>